PUNCA KLASIK SDN BHD

v.

MAHMOOD MAIDEEN

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-344-1994]
10 JANUARY 1997

CIVIL PROCEDURE: *Judgments - Order 14 Rules of the High Court 1980 - Time for filing application - Delay - Application filed prior to filing of defence - Whether necessary to explain delay - Prerequisites for application - Whether satisfied*

LAND LAW: *Recovery of land - Rights in land - Effect of registration - Alleged right in land not registered with Registrar of Title - Land sold to registered proprietor - Whether title of registered proprietor indefeasible - National Land Code 1965, ss. 205, 206, 213, 281, 291, 340*

Lot 4271 in this case was a piece of land in the township of Johore Bahru and was part of the estate of the late Syed Hassan bin Ahmad Alattas ('the said estate'). In 1949 Lot 4271 was registered in the name of the Estate and Trust Agencies (1927) Ltd as trustees for the said estate. This continued till 1981 when Lot 4271 was transferred to four individuals who became the new trustees. In 1991 the surviving trustees of the estate sold Lot 4271 to the plaintiff, which sale was sanctioned by the High Court *vide* an Order dated 29 February 1992.

The plaintiff, who became the registered owner of Lot 4271 on 21 January 1994, applied (*vide* encl. 28) for final judgment under O. 14 Rules of the High Court 1980 ('the RHC'). The defendant opposed the application and averred in his affidavit *inter alia* (i) that by an agreement dated 7 November 1955, his father had purchased from Syed Abdullah bin Hassan Alattas ('Syed Abdullah'), a beneficiary of the said estate, some 5840 square feet of land out of Lot 4271 ('the said land') (ii) that his father had assigned to him the said land *vide* an assigment dated 23 August 1970 (iii) that registration of Lot 4271 in the plaintiff's name was tainted with fraud (iv) that by a consent order dated 24 April 1978 issued by the Seremban High Court, ownership of the said land had been conclusively decided in his favour. That apart, certain preliminary objections had also been raised by the defendant pertaining to the filing of the O. 14 application.

The facts showed that at no time did the defendant register his alleged legal right in the said land. Several documents, nonetheless, were adduced by the defendant in support of his claim, including the agreement of 7 November 1955, the order of the High Court, Seremban dated 23 August 1978 and a document entitled 'Heads of Agreement' which the defendant took as the Distribution Agreement executed by the beneficiaries of the said estate. The main issues that arose were:

(i) whether Syed Abdullah had sufficient or any capacity to enter into a contractual agreement with the defendant's father for the sale of the said land.

(ii) whether the administration of the said estate was yet to be completed, and hence, whether any of the beneficiaries could be said to have interests in any specific property of the said estate.

(iii) whether the plaintiff's title to Lot 4271, by the operation of s. 340 National Land Code, was indefeasible.

Held:

[1] There were no merits in the preliminary objections. The plaintiff's affidavit had verified the facts on which the plaintiff based its claim. The deponent thereof had also stated his belief that there was no defence to that claim and had further stated that he was authorised to affirm the affidavit. The ingredients of O. 14 r. 2(1) of the RHC, thus, had been satisfied. The facts also showed that the O. 14 application was filed before the filing of the statement of defence. That being so, there was no necessity for the plaintiff to explain the delay.

[2] The agreement of 7 November 1955, and all the documents mentioned therein, were of no assistance to the defendant. These documents did not vest legal authority to the defendant to own the said land.

[2a] The Distribution Agreement was not an instrument capable of effecting transfer of a piece of land. Whoever drafted cl. 17 of the 'Heads of Agreement' should have realised that beneficiaries of a trust property such as Syed Abdullah herein lacked authority to enter into a legally enforceable contract to sell part of the trust property. And since Syed Abdullah did not have authority to sell the said land to the defendant's father, it must follow that the latter had no registrable interest to assign the same to the defendant.

[3] It was also clear that the administration of the said estate was still incomplete and the residuary thereof was yet to be ascertained. Consequently, any attempt then by the trustees to sell pieces of the lands forming the said estate would be an exercise in futility.

[4] The consent order dated 24 April 1978 was good and enforceable between the parties thereto. It could never be extended beyond that. That consent order did not cite the plaintiff nor the Estate and Trust Agencies (1927) Ltd as parties and, consequently, it was not binding upon them. The consent order clearly did not consider the fact that Syed Abdullah lacked capacity to enter into the sale agreement with the defendant's father, or that the administration of the said estate was incomplete and its residuary unascertained.

[5] The defendant must prove fraud beyond reasonable doubt. That the defendant had clearly failed to do.

[6] The plaintiff had been registered as the proprietor of Lot 4271 free from all adverse claims and incumbrances. The effect of such registration was that it would defeat all prior registered claims. It was not in dispute that the defendant had not registered the assignment that his father had purportedly executed in his favour. The defendant had also failed to register his legal right to the said land even though there was a provision in the order of the High Court, Seremban to that effect. That being the case, encl. 28 ought to be allowed.

[Order accordingly.]

Cases referred to:

Abdul Manaf Mohd bin Ghows & Ors v. Nusantara Timur Sdn Bhd & Ors [1994] 2 CLJ 379 ***(refd)***

Arnold & Others v. National Westminster Bank plc [1988] 3 All ER 977 ***(refd)***

Astbury v. Astbury [1898] 2 Ch D 111 ***(refd)***

Beh Lee Liang v. Chew Sah Suak @ Chew Sar San & Anor [1996] 1 CLJ 173 ***(refd)***

British American Life & General Insurance Bhd v. Pembinaan Fal Bhd & Ors [1994] 4 CLJ 652 ***(refd)***

B-Track Sdn Bhd v. Bingkul Timber Agencies Sdn Bhd & Anor [1989] 1 MLJ 124 ***(refd)***

Chan Yuow Seng v. Ling Ong Hua [1995] 2 MLJ 580 ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 ***(refd)***

Ewe Keok Neoh v. Ng Aun Thye [1934] vol III SSLR 23 ***(refd)***

Haji Abdul Rahman & Another v. Mahomed Hassan [1917] AC 209 PC ***(refd)***

Khoo Teng Seong v. Khoo Teng Peng [1990] 2 CLJ 233 ***(refd)***

Krishnamurthy & Anor v. Malayan Finance Corporation Bhd [1986] 2 MLJ 134 ***(refd)***

Lee Ah Thaw & Anor v. Lee Chun Tek [1978] 1 MLJ 173 ***(refd)***
Lee Sem Yoong v. Leong Yoong [1967] 2 MLJ 86 ***(refd)***
Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 2 MLJ 183 ***(refd)***
Marsh v. Joseph [1897] 1 Ch 213 CA ***(refd)***
Mayo v. Mayo [1943] 1 Ch D 302 ***(refd)***
N Vangedaselam v. Mahadevan & Anor [1976] 2 MLJ 161 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 ***(refd)***
Ong Chat Pang & Anor v. Valliapa Chettiar [1971] 1 MLJ 224 FC ***(refd)***
Otter v. Church, Adams, Tatham & Co [1953] Ch 280, [1953] 1 All ER 168 ***(refd)***
Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat & Anor [1992] 1 CLJ 1882 ***(refd)***
Pordage v. Cole [1669] 1 Wms Saund 319 ***(refd)***
Punca Klasik Sdn Bhd v. Abdul Aziz bin Abdul Hamid & Ors [1994] 1 CLJ 403 ***(refd)***
Punca Klasik Sdn Bhd v. All Persons in Occupation of the Wooden House Erected on a Portion of Land Held Under Grant No: 26977 for Lot 4271 in the Township of Johor Bahru, Johor & Another Action (No. 2) - referred to in short as Punca Klasik Sdn Bhd (No 2) [1995] 4 BLJ 337 ***(refd)***
Punca Klasik Sdn Bhd v. Liza James & Ors [1996] 3 CLJ 932 ***(refd)***
Re C Flower, MP, & Metropolitan Board Of Works (1884 F 1048) ***(refd)***
Re M Flower & Same (1884 F 1049) [1884] Ch D ***(refd)***
Re Romer and Haslam [1893] 2 QB 286 ***(refd)***
Re Tan Tye, deceased, Yap Liang Neo v. Tan Yew Chee [1936] MLJ 41 ***(refd)***
Re Whiteley, Bishop of London v. Whiteley [1910] 1 Ch D 600 ***(refd)***
Ross v. Caunters [1980] Ch 297; [1979] 3 All ER 580 ***(refd)***
Smith v. Claremont Haynes & Co [1991] Times, 3 September ***(refd)***
Society of Medical Officers of Health v. Hope [1959] 1 QB 462; [1959] 1 All ER 509; [1959] 2 WLR 377 CA ***(refd)***
Syn Lee & Co Ltd v. Bank of China [1961] MLJ 87 CA ***(refd)***
Tan Heng Poh v. Tan Boon Thong & Ors [1992] 1 CLJ 1340 ***(refd)***
Tan Tik Sing v. Gomez Development Co Sdn Bhd [1979] 2 MLJ 78 ***(refd)***
Teh Bee v. K Maruthamuthu [1977] 2 MLJ 7 FC ***(refd)***
White v. Jones [1995] 2 AC 207; [1995] 1 All ER 691 ***(refd)***
Wild v. Simpson [1919] 2 KB 544 ***(refd)***
Wilkinson v. Malin [1832] 2 Tyrw 544 ***(refd)***
Wong Peng Yan Benjamin v. Genting Bhd & Anor [1994] 1 CLJ 351 ***(refd)***
Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi s/o Mookan & Anor, Dekor Panel Emas Sdn Bhd (intervener) [1994] 3 CLJ 265 ***(refd)***

Legislation referred to:

National Land Code 1965, ss. 205(1), 206(1)(b), (2), 213(2), 215(1), (2), 281(1), 292(1), 322(1), 340(2)(b)
Rules of the High Court 1980, O. 3 r. 5, O. 14 r. 2(1)
Law of Property Act 1925 [UK], s. 30
Real Property Limitation Act 1833 [UK], s. 42

For the plaintiff - Ng Chew Hor; M/s Leng & Co
For the defendant - David Oh Kit Yan; M/s Skrine & Co

Reported by Rusnah Abd Aziz

JUDGMENT

Abdul Malik Ishak J:

On 25 January 1995 encl. 5 which was for an "injunksi menahan defendan sama ada dia sendiri, pekerjanya atau ejennya atau walau bagaimana sekalipun daripada memasuki berada atau menghalang atau campur tangan atau berurusan berkenaan tanah yang dikenali sebagai Geran 26977 Lot 4271 Bandar Johor Bahru (hereinafter referred to as 'Lot 4271') dan terutama sekali tetapi tidak dihadkan kepada Lot 108 dan Lot 109 di atas tanah tersebut sehingga penghakiman atau perintah selanjutnya" was heard and an order in terms thereof was ordered after Mr. K.H. Koh for the plaintiff informed the court that Mr. Awtar Singh for the defendant agreed to it. Costs in the cause was also ordered for encl. 5.

On 6 July 1995, the defendant's summons in chambers in encl. 25 for the following prayers:

(1) Bahawa plaintiff di sekat (restrained) melalui satu Interim Injunction dari menerima wang pampasan yang akan dibayar oleh Pentadbir Tanah Daerah ke atas Lot 4271.

(2) Atau secara alternatif, Pentadbir Tanah Daerah diarahkan membayar semua wang pampasan terhadap tanah tersebut ke Mahkamah sehingga penyelesaian perkara kes ini.

was fixed for hearing but Mr. Awtar Singh for the defendant and mentioning for the plaintiff's solicitor sought for an adjournment for two weeks as the parties were in the midst of negotiating for a settlement. This court then adjourned the matter to 28 July 1995 for mention of encl. 25.

On 26 July 1995, encls. 19 and 28 were scheduled for hearing and on that day though Mr. K.H. Koh was ready to submit yet Mr. Awtar Singh sought for an adjournment as he has a hearing in open court of another case before me. The matter was then adjourned to 10 August 1995.

On 28 July 1995, encl. 25 came up for mention with Mr. Awtar Singh acting for the defendant and mentioning for the plaintiff's counsel. Mr. Awtar Singh proposed that encl. 25 be fixed for hearing on 10 August 1995 together with encls. 19 and 28. This court acceded to Mr. Awtar Singh's proposal.

On 10 August 1995, encls. 19, 25 and 28 came up for hearing. Mr. Awtar Singh applied for an adjournment as he wanted to cite third parties to these proceedings. He said that he just came across a deed of family arrangement dated 10 September 1959 which was endorsed by the court dated 17 September 1959. He said the third parties would indemnify his client for any loss sustained. He said that he was willing to pay costs thrown away for the day to the plaintiff's counsel who had come all the way from Kuala Lumpur. Mr. K.H. Koh for the plaintiff objected to the adjournment and it was his stand that the citing of the third parties would not involve his client. He said that the submissions for these enclosures should proceed forthwith. Nevertheless, Mr. K.H. Koh requested that costs in the region of RM250 should be awarded to the plaintiff in the event this court granted the adjournment. An adjournment was accordingly granted and the defendant was ordered to pay RM250 before the next date of hearing on 16 October 1995.

On 16 October 1995, once again encls. 19, 25 and 28 came up for hearing. Mr. Awtar Singh informed the court that by letter dated 13 October 1995 he had requested for an adjournment of the hearing for encls. 19, 25 and 28 as his summons-in-chambers for encl. 37 to bring third parties would be heard by the Senior Assistant Registrar ('SAR') today. Mr. Awtar Singh then informed the court that he would be withdrawing encl. 25 and he proposed to have encls. 19 and 28 heard on some other day. Mr. K.H. Koh seemed agreeable and, consequently, encl. 25 was struck out and encls. 19 and 28 were fixed for hearing on 17 November 1995.

On 17 November 1995 when encls. 19 and 28 came up for hearing, Mr. Awtar Singh requested for an adjournment and he mentioned the matter for the plaintiff's counsel. As expected, Mr. Awtar Singh informed the court that his client wished to engage another counsel. According to Mr. Awtar Singh the plaintiff's counsel agreed to the adjournment and pending the appointment of a new solicitor for the defendant, the plaintiff's counsel agreed to a hearing date for encls. 19 and 28 sometime in January 1996. This was acceded to and this court gave 30 January 1996 for the hearing of encls. 19 and 28.

On 30 January 1996, Miss Indra Ramanathan mentioned for both parties and she requested for another date for the hearing of encls. 19 and 28. She too undertook to inform both parties of the new date for hearing. This court gave 13 February 1996 for the hearing of encls. 19 and 28.

On 13 February 1996, Mr. Sanjay Mohanasundaram from Messrs. Skrine & Co. appeared for the defendant and he mentioned on behalf of the plaintiff's counsel. He said that he needed an adjournment to file a further affidavit and

that the plaintiff did not object to the adjournment. He requested for one month's adjournment for the hearing of encls. 19 and 28.

This court granted the adjournment and gave 13 March 1996 as the date for the hearing of encls. 19 and 28. He undertook to inform the plaintiff's counsel.

On 13 March 1996 this court waited in vain for the arrival of both Mr. K.H. Koh and Mr. Sanjay Mohanasundaram. The plaintiff and the defendant too did not turn up. This court waited till 4.15 p.m. as can be seen from the notes of proceedings. In the absence of all parties, this court had no choice but to strike out encls. 19 and 28 with liberty to file afresh.

On 15 May 1996 by a notice of change of solicitors Mr. Ng Chew Hor from Messrs. Leng & Co. (encl. 56) took over from Mr. K.H. Koh of Messrs. K.H. Koh Azhar & Koh and represented the plaintiff. No time was wasted. By way of a summons-in-chambers in encl. 53 supported by an affidavit in encl. 53A it was sought to revive encls. 19 and 28. It transpired that Mr. Sanjay Mohanasundaram had volunteered to mention for the plaintiff's counsel on 13 March 1996 but he did not turn up. This is very distressing. In due course, the SAR reinstated and restored encls. 19 and 28. It must be pointed out that when retained by a client a solicitor undertakes to finish the work for which he is retained (*Re Romer and Haslam* [1893] 2 QB 286 at 298 CA). Generally speaking a retainer is an entire contract - a contract to do certain business (*Pordage v. Cole* [1669] 1 Wms Saund 319). The solicitor will only be remunerated at the completion of the business. Thus, remuneration cannot be recovered on a quantum meruit where the solicitor withdraws without legal justification (*Wild v. Simpson* [1919] 2 KB 544 at 566 CA, per Atkin LJ), nor can costs be recovered in these circumstances. As an officer of the court if the solicitor fails to fulfil his duties in regard to a matter which is before the court, the solicitor will be penalised with costs and will be liable to such loss which is the natural and probable consequence of his conduct (*Marsh v. Joseph* [1897] 1 Ch. 213, CA). A solicitor owes a duty to his client both in contract and in tort (*Ross v. Caunters* [1980] Ch. 297, [1979] 3 All ER 580; and *White v. Jones* [1995] 2 AC 207, [1995] 1 All ER 691 HL); and it is natural that a solicitor may be liable to a third person for the tort of negligence (*Smith v. Claremont Haynes & Co.* [1991] Times, 3 September). It is a correct statement of the law to say that where the solicitor is in breach of his contractual duty to his client and the client suffers loss as a result, he is liable in damages (*Otter v. Church, Adams, Tatham & Co.* [1953] Ch. 280, [1953] 1 All ER 168). Be that as it may, after several adjournments encls. 19 and 28 came up for hearing on 17 December 1996. Mr. Tai Foong Lam for the defendant raised two major preliminary objections in regard to the application by the plaintiff for final judgment in encl. 28. He submitted that the affidavit

of Wong Chan Thong in encl. 27 that was affirmed on 5 June 1995 in support of encl. 28 was defective as it was contrary to the prescribed manner as set out in O. 14 r. 2(1) of the Rules of the High Court 1980 ('RHC') and, consequently, encl. 28 should be struck out with costs. Order 14 r. 2(1) of the RHC reads as follows:

> An application under r. 1 must be made by summons supported by an affidavit in Form 18 verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.

The ingredients of O. 14 r. 2(1) of the RHC may be stated thus:

> (1) the deponent must verify the facts on which the claim or part of a claim to which the application relates is based;
>
> (2) the deponent must state his belief that there is no defence to that claim or part, or no defence except as to the amount of any damages claimed; and
>
> (3) the deponent who affirms the affidavit must be an authorised individual who can swear positively to the facts.

Ajaib Singh J (as he then was) in *Tan Tik Sing v. Gomez Development Co. Sdn. Bhd.* [1979] 2 MLJ 78 said in the same vein to the following effect:

> In an application for summary judgment under O. 14 or O. 14A of the Rules of The Supreme Court the person making the affidavit in support must verify the cause of action and state that in his belief there is no defence to the action. Failure to do so is fatal to any application for summary judgment. Indeed the court of a judge to whom an application for summary judgment is made may not even consider the application if the person making the affidavit in support is not prepared to verify the cause of action on oath and say that in his belief there is no defence to the action. No less important is the requirement that the person who makes the affidavit must be the plaintiff or any other person who can swear positively to the facts.

Now, looking at the affidavit of Wong Chan Thong in encl. 27, he did say that he's the General Manager of Punca Klasik Sdn. Bhd. and he solemnly and sincerely affirmed the said affidavit. He too verified the facts on which the claim to which the application in question was based by adverting briefly to the particulars of the Amended Statement of Claim. Finally, he said that he verily believed that there was no defence to the action. Even if encl. 27 is defective as suggested by Mr. Tai Foong Lam, Mr. Terence Lee Chau Yee rightly pointed out that it was remedied by an additional affidavit of Wong

Chan Thong that was affirmed on 9 October 1996 as reflected in encl. 70. A perusal of encl. 70 would certainly confirm what was stated by Mr. Terence Lee Chau Yee. Of crucial importance, encl. 70 did say that Wong Chan Thong as the General Manager of Punca Klasik Sdn. Bhd. was duly authorised to make the affidavit. It is interesting to note that on 2 October 1996 when this case came up for hearing Mr. Ng Chew Hor appeared for the plaintiff and he mentioned for the defendant's counsel. It was at this stage that Mr. Ng Chew Hor orally applied under O. 3 r. 5 of the RHC to extend or abridge time to file an additional affidavit of Wong Chan Thong which was subsequently carried out smoothly as seen in encl. 70. Mr. Ng Chew Hor informed the court on 2 October 1996 that the defendant's counsel agreed to extend or abridge time for Wong Chan Thoong to file his additional affidavit. A concession of this nature must surely tie the defendant forever. The defendant's counsel seemed to be oblivious of their own concession. This is indeed a dangerous trend. The Courts throughout the country merely accept the words of counsel at the bar as gospel truths in cases of this nature. I do not doubt the integrity of Mr. Ng Chew Hor – he has shown and demonstrated on many occasions the true grit of a good lawyer. I am aware of what Gopal Sri Ram JCA said in *Ng Hee Thoong & Anor. v. Public Bank Berhad* [1995] 1 MLJ 281 in the context of an affidavit evidence where it was stated that evidence upon a matter must be stated on oath. Here, Mr. Ng Chew Hor informed the court at the bar that the defendant's counsel agreed to extend or abridge time to enable Wong Chan Thong to file an additional affidavit. It is something that happens everyday which will be accepted by this court without question. There was no need to put in an affidavit. If there was a defect in the affidavit of Wong Chan Thong in encl. 27, it was cured by Wong Chan Thong's additional affidavit in encl. 70 (*British American Life & General Insurance Bhd. v. Pembinaan Fal Berhad & Ors.* [1994] 3 MLJ 267). Since the defendant's counsel had agreed to the filing of enc. 70, the question of delay in filing encl. 70 did not arise at all.

On the question of delay in filing affidavits, both parties are equally at fault. Enclosure 27 was filed on 6 June 1995 while encl. 70 was filed on 9 October 1996 – a delay of more than a year, to be precise one year four months three days. The defendant also took his own sweet time in filing enclosing 68 – an affidavit-in-reply by the defendant himself affirmed on 24 October 1996. Enclosure 68 was filed on 24 October 1996 in reply to encl. 27. There was a delay of more than a year when the defendant filed encl. 68 in reply to encl. 27 – to be exact it would be one year four months 18 days. This is a classical example of the pot calling the kettle black. There is absolutely no merit to this preliminary objection and I so ruled accordingly.

The second preliminary objection was in regard to the delay in filing the O. 14 application. For this purpose, I should set out the chronology of events. On 4 November 1994 the writ of summons and the statement of claim (encl. 2) were filed. On 30 November 1994, a memorandum of appearance (encl. 13) was entered for the defendant. On 6 June 1995, the O. 14 application (encl. 28) for final judgment was filed and it was supported by an affidavit in encl. 27 that was also filed on 6 June 1995. The statement of defence was filed on 25 October 1996 (encl. 66). It must be emphasised that the Statement of Defence was filed after the filing of the O. 14 application. Abu Mansor J, (now JCA) in *B-Track Sdn. Bhd. v. Bingkul Timber Agencies Sdn. Bhd. & Anor.* [1989] 1 MLJ 124 especially at p. 126 said after setting out the chronology of events the following:

> I agree with counsel for the defendants that the plaintiffs are not precluded from taking out an Order 14 summons after defence is filed but the onus of explaining delay thereafter is on the plaintiffs and in this case the plaintiffs had not discharged the onus as they had explained.

Salleh Abas LP (as he then was) in delivering the judgment of the then Supreme Court in *Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd.* [1986] 2 MLJ 134 SC especially at p. 135 had this to say on an O. 14 application:

> ... the law as to the time when an application for an Order 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court no Order 14 judgment could be signed. This is the *ratio decidendi* in *McLardy v. Slateum* [1890] 24 QBD 504. This case was followed by Raja Azlan Shah J (as he then was) in Comptroller-General of Inland Revenue, *Malaysia v. Weng Lok Mining Co. Ltd.* [1969] 2 MLJ 98 and Abdoolcader J (as he then was) in *Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267.

The headnote to the case of *Ng Hee Thoong & Anor v. Public Bank Bhd.* (*supra*) merits reproduction. It is this:

> It is a principle fundamental to the system of adversarial litigation that evidence upon a matter must be given on oath. Whenever there is a delay, it is for the plaintiff to give an explanation by affidavit, even before the point is taken by the other side. In this case, the explanation for the respondent's delay was given by counsel from the Bar and not by the respondent under oath. The proper way to reply the appellants' positive assertion on oath that there had been inordinate delay was by way of an affidavit in answer.

Must the plaintiff explain the delay in filing the O. 14 application to this court? Applying *Krishnamurthy (supra)*, of which I am bound, there was no necessity for the plaintiff to explain the delay because the O. 14 summons was filed before the statement of defence was filed. *Abdul Manaf Mohd bin Ghows & Ors. v. Nusantara Timur Sdn. Bhd. & Ors.* [1994] 2 MLJ 180 echoes the same principle of law. It goes without saying that the second preliminary objection must also fail. Mr. Tai Foong Lam quickly applied for an adjournment of the hearing of encls. 19 and 28. I granted the adjournment even though Mr. Terence Lee Chau Yee said that he was prepared to submit on encls. 19 and 28. As Mr. Tai Foong Lam intimated his desire to appeal in regard to the rulings on the preliminary objections, I adjourned hearing of encls. 19 and 28 to 6 January 1997. Events subsequently showed that no appeals were lodged in regard to these preliminary objections.

On 6 January 1997, encls. 19 and 28 came up for hearing. On that day, Mr. Ng Chew Hor for the plaintiff withdrew encl. 19 with the concurrence of Mr. Douglas W.L. Yee for the defendant. Accordingly, encl. 19 was struck out without any order as to costs. The case proceeded for submission in regard to encl. 28. But since Mr. Douglas W.L. Yee was not in receipt of the affidavit-in-reply of Wong Chan Thong in encl. 72, Mr. Ng Chew Hor handed to him the sealed copy of encl. 72. The hearing for encl. 28 was then adjourned to 8 January 1997 on the request of Mr. Douglas W.L. Yee.

On 8 January 1997, encl. 28 was heard by me. The facts of this case are on similar lines with that of *Punca Klasik Sdn. Bhd. v. Liza James & Ors.* [1996] 3 CLJ 932 and *Punca Klasik Sdn. Bhd. v. All Persons in Occupation of the Wooden House Erected on a Portion of Land Held Under Grant No: 26977 for Lot 4271 in the Township of Johor Bahru, Johor and Another Action (No. 2) - referred to in short as Punca Klasik Sdn. Bhd. (No. 2)* [1996] 5 MLJ 92. Nevertheless, the facts relevant to this case will be set out so as to show the perspective of the whole case.

On 21 January 1994 the plaintiff became the registered proprietor of Lot 4271. Previous to this, Lot 4271 was known as CT 2264 and before that as Malay Grant 1572. There is an interesting history behind Lot 4271.

Lot 4271 was part of the estate of the late Syed Hassan bin Ahmad Alattas ('the said estate'). From 14 May 1949, Lot 4271 was registered in the name of the Estate and Trust Agencies (1927) Ltd as trustees for the said estate. This continued till 13 January 1981 when Lot 4271 was finally transferred to four persons who held it as trustees of the said estate. These four persons were:

(1) Syed Mohamed bin Idroos Alattas;

(2) Dato' Ungku Mohsin bin Mohamed;

(3) Syed Ali bin Mohamed Alattas; and

(4) Syed Hussein bin Salim Alattas.

Later, on 6 May 1981, Lot 4271 was transferred and registered in the names of four individuals, namely:

(1) Syed Hussein bin Salim Alattas;

(2) Syed Salleh bin Abdul Rahman Alattas;

(3) Syed Abdul Kadir bin Mohd. Alattas; and

(4) Syed Mohamed Zain Alattas.

and these four individuals held Lot 4271 as trustees of the said estate.

It can be seen therefore that Lot 4271 was a land held under a trust by Estate and Trust Agencies (1927) Ltd from 14 May 1949 till 13 January 1981 when it was then transferred and registered in the names of several individuals as listed above who also held Lot 4271 as trustees of the said estate. All these facts are not in dispute.

It must also be emphasised that Lot 4271 was never subdivided and that no instrument of transfer in any form whatsoever (be it under the Johor Land Enactment No: 1 or the National Land Code 1965 ('NLC') was executed in favour of the defendant. The plaintiff purchased Lot 4271 from the surviving trustees of the said estate namely Syed Salleh bin Abdul Rahman Alattas, Syed Hussein bin Salim Alattas and Syed Abdul Kadir bin Mohd. Alattas *vide* a written sale and purchase agreement dated 9 July 1991 as reflected in exh. "WCT 6" of encl. 72 for RM24 million. There was nothing sinister about this purchase as the surviving three trustees obtained a High Court order dated 29 February 1992 to sell Lot 4271 "dengan cara tawaran awam" (see exh. "WCT 5" of encl. 72). By this court order the plaintiff was given the option to purchase upon payment of the additional RM250,000. The plaintiff exercised that option and successfully purchased Lot 4271 in accordance with the terms of that court order.

The defendant affirmed an affidavit-in-reply on 24 October 1996 as reflected in encl. 68 and there he deposed that his father by the name of K. Kungi Moidin purchased 5,840 square feet of land out of Lot 4271 situated at Jalan Abdul Rahman Andak, Johor Bahru from Syed Abdullah bin Hassan Alattas by an agreement dated 7 November 1955. There were only seven clauses in

the agreement dated 7 November 1955 and only two clauses merit attention. Clause 2 states that:

> The purchase shall be completed within one month from the time when the vendor shall have given written notice to the purchaser of his readiness to execute an Agreement of Sale and Irrevocable Power of Attorney in favour of the purchaser in respect of the aforesaid portion of land Provided Always that the purchaser shall be entitled to refuse to complete the purchase herein until the Distribution Agreement of the property of the said deceased shall have been signed by all the beneficiaries of the said deceased and the aforesaid portion of land shall be vested in the vendor.

Four observations of crucial importance arising out of cl. 2 must be mentioned. Firstly, the written notice which the vendor shall give to the purchaser was not adverted to in the defendant's affidavit-in-reply and neither was it exhibited to show to this court that the written notice had actually been given. Secondly, an Agreement of Sale and Irrevocable Power of Attorney in favour of the purchaser (K. Kungi Moidin), if executed, had not been exhibited. The irresistible inference would be that the Agreement of Sale and Irrevocable Power of Attorney was not even prepared and without due preparation it cannot be executed. In the absence of this document, the sale of 5,840 square feet of land would be nullified. Thirdly, the Distribution Agreement signed by all the beneficiaries of the said estate was not exhibited and the irresistible inference would be that it was not signed and hence not available for perusal of this court. Fourthly, if the Distribution Agreement had not been signed by all the beneficiaries, the 5,840 square feet of land will not be vested in the vendor (Syed Abdullah bin Hassan Alattas) for him to sell to K. Kungi Moidin.

Clause 4 of the agreement dated 7 November 1955 states as follows:

> As soon as the aforesaid portion of land shall become vested in the vendor, the vendor shall apply to the Government of Johore for sub-division. The purchaser shall bear the cost of the issue of a grant for the said portion of land and the survey fees for the sub-division including cost of boundary stones.

It is obvious that cl. 4 must be read in the context of cl. 2 and that being the case as stated earlier the 5,840 square feet of land had not been vested in the vendor (Syed Abdullah bin Hassan Alattas) and, consequently, the vendor cannot apply to the Government of Johore for sub-division. It is for the defendant to show that there was strict adherence to cll. 2 and 4 in order to challenge the O. 14 application. Indeed, if there was strict compliance with cll. 2 and 4 to the agreement dated 7 November 1955, the defendant would have exhibited proudly to this court the Agreement of Sale and Irrevocable Power of Attorney together with the Distribution Agreement. But alas, this was not to be. No doubt there was a draft of the "Heads of Agreement" as

set out in exh. "A3" of encl. 68 yet it was not signed by all the beneficiaries and neither was it stamped. It remained a draft only. It should be termed "Distribution Agreement" following closely cl. 2 and not "Heads of Agreement" – it was purely a matter of conjecture as to why this was not done. At any rate I have more to say about the "Heads of Agreement" at a later stage.

The defendant in his affidavit-in-reply in encl. 68 annexed seven documents marked jointly as exh. "A3" and they can be itemised as follows:

(1) An affidavit affirmed by James William Wotherspoon, the General Manager of the Estate and Trust Agencies (1927) Ltd. on 18 December 1957 in regard to the High Court, Johore Bahru Civil Suit No: 20 of 1937;

(2) The judgment of Mr. Justice John Vivian Gottlieb Mills dated 26 October 1937 in regard to the High Court, Johore Bahru Civil Suit No: 20 of 1937;

(3) A letter from Messrs. Allen & Gledhill to Messrs. Laycock & Ong dated 23 November 1955;

(4) A letter dated 10 September 1957;

(5) A letter dated 30 September 1957 from S.M.N. Alattas to Messrs. Laycock & Ong;

(6) An unsigned document entitled: "Syed Hassan bin Ahmad Alattas, Deceased, Johore Civil Suit No: 20 of 1957. Heads of Agreement"; and lastly

(7) A letter dated 11 October 1957 from Messrs. Laycock & Ong

I shall now proceed to examine these documents. The affidavit of James William Wotherspoon bore his signature and that of the signature of C.G. Toh, the Commissioner for Oaths at p. 11. It is interesting to reproduce para. 26 of Wotherspoon's affidavit:

> All the four former trustees, three of whom have died and nearly all the beneficiaries are involved. The properties affected were apparently sold, assigned or disposed of by the individual acts of the former trustees or the beneficiaries and which were done without lawful authority. It therefore follows that the commencement of legal proceedings to recover possession of these estate properties would personally implicate most if not all the sons and daughters of the abovenamed testator, Syed Hassan bin Ahmad Alattas deceased, the beneficiaries of this estate.

It is also useful to reproduce para. 30 of Wotherspoon's affidavit which is worded thus:

> I therefore pray that this Honourable Court will excuse the plaintiffs for their omission in not taking such earlier proceedings or steps to eject the unlawful occupiers and to relieve the plaintiffs wholly from any personal liability.

Admittedly, there were properties that were "sold, assigned or disposed of by the individual acts of the former trustees or the beneficiaries' and these were said to be done without lawful authority. This must by necessary inference included the 5,840 square feet of land that was purportedly sold by Syed Abdullah bin Hassan Alattas on 7 November 1955. I am fortified in my view by the fact that Wotherspoon's affidavit was affirmed on 18 December 1957 and, consequently, its contents must have taken into account the agreement dated 7 November 1955.

In regard to the judgment of Mr. Justice John Vivian Gottlieb Mills, it was in the nature of a consent judgment where Syed Ahmad bin Hassan Alattas, Syed Salim bin Hassan Alattas, Syed Abdullah bin Hassan Alattas and Syed Zin bin Hassan Alattas as executors and trustees of the WILL of the late Syed Hassan bin Ahmad Alattas were permitted to retire from the trusts of the said WILL and that the Estate and Trust Agencies (1927) Ltd were appointed to act as trustees in their stead. The true accounts of the said estate were also ordered by consent to be prepared.

The letter dated 23 November 1955 from Messrs. Allen & Gledhill to Messrs. Laycock & Ong spoke of the depletion of assets and the need to be cautious in giving further advances to the beneficiaries.

The letter dated 10 September 1957 highlighted certain inquiries that were undertaken and it put to the forefront the following salient points:

(a) there was an assurance that the family disputes would soon be settled and an agreement to that effect was being drafted;

(b) there was a need to apply to the Registrar, Supreme Court, Johore Bahru to reinstate the accounts and inquiries for further hearing;

(c) there was a need to institute legal proceedings to recover possession from the unlawful occupiers; and finally this letter shows beyond doubt that the said estate had not been fully administered as yet.

The letter dated 30 September 1957 from S.M.N. Alattas to Messrs. Laycock & Ong merely enclosed a copy of the draft of "Heads of Agreement" between the beneficiaries of the said estate. This letter also mentioned that all the beneficiaries to the said estate had signed the "Heads of Agreement" and that

only two individuals had yet to put their signatures thereto, namely Syed Alwi bin Abdullah Alattas and Syed Mohamed bin Idroos Alattas. Now, looking at the "Heads of Agreement" it is apparent that the signatures of the beneficiaries to the said estate are no where to be seen. The signatures of the attesting witnesses too are not found at pp. 12 and 13 of the "Heads of Agreement." The First Schedule to the "Heads of Agreement" listed parts of the lands of the said estate which were available for sale or distribution and this did not include the 5,840 square feet of the land which K. Kungi Moidin purportedly purchased from Syed Abdullah bin Hassan Alattas. The Second Schedule to the "Heads of Agreement" comprised lands of the said estate that were earmarked to be sold by public auction and again it did not include that 5,840 square feet of land. Syed Abdullah bin Hassan Alattas was alloted Lot 23 as shown in the plan that was made in 1929 and that plan was said to be attached to the testator's WILL, but unfortunately this court was deprived of knowing whether Lot 23 was in fact Lot 4271 or was Lot 23 part and parcel of the 5,840 square feet of land which K. Kungi Moidin proportedly purchased from Syed Abdullah bin Hassan Alattas. The particulars provided in the "Heads of Agreement" were too scanty. Finally, there was provision in the "Heads of Agreement" for dispute to be referred to Arbitrators. All these are well and good. But the two crucial questions to ask are these: "Have the beneficiaries of the said estate signed the "Heads of Agreement" in the presence of and attested before practicising solicitors or individuals of repute? Have the parties stamped the "Heads of Agreement"?" These are questions that are still left unanswered.

Finally, the letter dated 11 October 1957 from Messrs. Laycock & Ong adverted to three things:

(1) that the family disputes will be finally settled;

(2) that Messrs. Laycock & Ong have seen the "Heads of Agreement' which have been signed by all the beneficiaries except one or two;

(3) that they have to eject unlawful occupiers to prevent time from running against the estate.

But this letter did not say that the beneficiaries who have signed the "Heads of Agreement" have signed them in the presence of practising solicitors or individuals of repute nor did this letter say that the "Heads of Agreement" have been stamped.

In my judgment, all the seven documents marked jointly as exh. "A3" in encl. 68 were of no assistance to the defendant. These seven documents did not vest legal authority to the defendant to own 5,840 square feet of land out of

Lot 4271. It was a wrong assertion and a misleading one at that when the defendant deposed at para. 8 of encl. 68 that by virtue of the Distribution Agreement (it must be the "Heads of Agreement") Syed Abdullah bin Hassan Alattas was entitled to sell 5,840 square feet of land to the defendant. The brief references to the "Heads of Agreement" in the early part of this judgment would show that there was no specific mention that Syed Abdullah bin Hassan Alattas was authorised to sell 5,840 square feet of land *vide* Malay Grant No: 1572 situated at Jalan Abdul Rahman Andak, Johore Bahru to the defendant. No doubt in the First Schedule to the "Heads of Agreement" there was mention of Lot 1405, M.C. 1572, located on the left of Jalan Ngee Heng, Johore Bahru, with an area of 30 acres 1 rood 00 pole which was available for sale or distribution but it certainly was not Malay Grant 1572 situated at Jalan Abdul Rahman Andak, Johore Bahru.

Clause 17 of the "Heads of Agreement" stated that the former trustees during their trusteeship sold through Mr. Ismail certain pieces of land forming part of Malay Grant No: 1572 and that these sales were for the purpose of raising money to pay expenses in connection with the administration of the testator's estate. The said sales were said to be recognised and confirmed by the beneficiaries provided that they contain an approximate area of 5¾ acres in all. It was said that Syed Abdullah bin Hassan Alattas as sole survivor of the former trustees will prepare and submit to the present trustees a list of the pieces of land thus sold and of the amounts paid by the purchasers showing particularly any amounts which have been outstanding and unpaid. With respect, whoever drafted cl. 17 of the "Heads of Agreement" should realise that beneficiaries of a trust property lacked authority to enter into a legally enforceable contract to sell part of the trust property. Only the registered proprietor of the trust property, at the material time, have the necessary legal authority to sell part of the trust property. On 7 November 1955, Lot 4271 was registered under the Estate and Trust Agencies (1927) Ltd and the latter should be the correct legally constituted party to sell 5,840 square feet of land out of Lot 4271 to K. Kungi Moidin. Syed Abdullah bin Hassan Alattas had no legal capacity on 7 November 1955 to sell 5,840 square feet of land out of Lot 4271 to K. Kungi Moidin (*Punca Klasik Sdn. Bhd. (No: 2) (supra) and Yeoh Tiong Lay & Sons Holdings Sdn. Bhd. v. Annavi s/o Mookan & Anor., Dekor Panel Emas Sdn. Bhd. (intervener)* [1994] 3 CLJ 265). Having perused through the seven documents marked jointly as exh. "A3" in encl. 68, paying special attention to the "Heads of Agreement", a singular thread appears and that is that the administration of the said estate was incomplete and the residuary thereof not ascertained as yet. Consequently, the mad rush by the former trustees during their trusteeship to sell certain pieces of the land forming part of Malay Grant No: 1572 through Mr. Ismail as alluded to in cl. 17 of the "Heads of Agreement" was an exercise in futility. The trustees

as beneficiaries have no interests in any specific property of the said estate as the said estate was incomplete and its residuary unascertained (*Ewe Keok Neoh v. Ng Aun Thye* [1934] Vol. III SSLR 23; *Lee Ah Thaw & Anor v. Lee Chun Tek* [1978] 1 MLJ 173; *Khoo Teng Seong v. Khoo Teng Peng* [1990] 3 MLJ 37; *Tan Heng Poh v. Tan Boon Thong & Ors.* [1992] 2 MLJ 1; and *Punca Klasik Sdn. Bhd. v. Liza James & Ors.* [1996] 3 CLJ 932).

The purported assignment of 5,840 square feet of land out of Lot 4271 to the defendant on 23 August 1970 as reflected in exh. "A4" of encl. 68 was equally infected. Since Syed Abdullah bin Hassan Alattas as a beneficiary lacked authority to enter into a legally enforceable contract with K. Kungi Moidin on 7 November 1955, the latter had no registrable interest to assign to his son – the defendant. Indeed, this is a sad thing. But the rigours of the law must take its own course. I did say in Punca Klasik Sdn. Bhd. (No: 2) (*supra*), which must surely apply to the present case, the following:

> Reverting back to the issue at hand, it is abundantly clear that the NLC prohibits totally the transfer of a part of any alienated land or a part of an undivided share in that land. Now, even if one were to go to an extreme to say that Lim's father and Ng's father contracted to purchase those parts or portions from Estate and Trust Agencies (1927) Ltd, which is not the case here, that is clearly barred under s. 214 (1) of the NLC. As the facts stand, both Lim's father and Ng's father purchased those parts or portions from Syed Ali and Syed Abdullah respectively and clearly under the Land Enactment No: 1 that would be barred as, at the material time, the registered proprietor of the land was Estate and Trust Agencies (1927) Ltd and the Land Enactment No: 1 as it then stood prohibited the transfer of a part of the alienated land. Either way, no matter how one argues for Lim and Ng., the result would be the same. Lim and Ng have no registrable interests on those parts or portions as they claimed they had.
>
> The rationable for imposing a prohibition to transfer a part of the alienated land stems from quite an obvious reason. As a matter of practice since there is only one title issued in respect of an alienated land whether held by a single proprietor or otherwise, it follows that a transfer of part of that alienated land cannot be effected unless and until separate title has been issued in respect of the part of the land which is sought to be transferred. A separate title can only be issued on such part of the land upon sub-division of the said land. If the land is held under co-proprietorship, a transfer of a part of an undivided share can be done by partitioning land into respective portions according to the undivided share which each of the co-proprietors hold in respect of the land and issuing separate titles to each of the partitioned portion formerly held together under one title.

Now, since the purported assignment was dated 23 August 1970, the NLC would be the correct statute to refer to. Section 215 (1) of the NLC enacts that the transfer of any alienated land shall be effected by an instrument in Form 14A. Section 215 (2) of the NLC further enacts that the title of the transferor shall pass to and vest in the transferee upon the registration of any such transfer, together also with the benefit of any registered interests then enjoyed with the land. In plain language, title to or interest in land vests and divests only upon registration. Registration under the NLC constitutes the final stage of any dealings in land. Dealings under the NLC which are capable of being registered are transfers, leases, charges and easements (see 205 (1) and 292 (1) of the NLC). Under s. 206 (1)(b) of the NLC no title to or interest in land will be transferred or created until the instruments effecting these dealings have been registered. Under s. 206 (2) of the NLC, two types of dealings are not capable of registration but it can be created – they are tenancies and liens. Thus, a tenancy may be granted verbally or by way of a written form and it is exempt from registration, hence, the term "tenancy exempt from registration" (s. 213 (2) of the NLC) comes into being. A lien is normally created upon the entry of a lien - holder's caveat by an individual or a body as envisaged under s. 281 (1) of the NLC. It is clear therefore from a brief recital of the law, the purported assignment is not capable of being registered. Neither is the purported assignment an instrument like Form 14A. On 23 August 1970, Lot 4271 was registered under Estate and Trust Agencies (1927) Ltd who held it in trust for the said estate. If, which is not the case here, the 5,840 square feet of land out of Lot 4271 was sold by the Estate and Trust Agencies (1927) Ltd to the defendant's father, the defendant could easily effect a transfer way back in 1955 under the Land Enactment No: 1 which was then in force. The purported assignment too was not registered with any relevant land office and even if there was an attempt to do so it would not be entertained by that relevant land office.

Reverting back to the "Heads of Agreement", it is my judgment that it was not an instrument capable of effecting transfer of a piece of land and neither was it registered with the relevant land office and of pertinence it was not an instrument capable of being registered under the NLC or under the Land Enactment No: 1 as it was then known.

Both paras. 10 and 11 of encl. 68 gave prominence and emphasised the Order of the High Court, Seremban dated 24 April 1978 in regard to Originating Summons No: 41 of 1978. This was a consent order made in chambers between Sharifah Fatimah binte Abdullah Alkudsi Administratrix of the Estate of Syed Abdullah bin Hassan Alattas, deceased as applicant and Mahmood bin Maideen as respondent. It declared that the defendant was the owner of Lots 108 and 109 under certificate of title no: 2264 Lot 4271, Jalan Ngee

Heng, Johore Bahru (it must be emphasised that the defendant was interested in 5,840 square feet of land out of Lot 4271 situated at Jalan Abdul Rahman Andak, Johore Bahru as stated in the agreement dated 7 November 1955). It is perhaps appropriate to reproduce verbatim the consent Order of the High Court, Seremban dated 24 April 1978 which is as follows:

> IT IS ORDERED that the applicant, the Administratrix of the estate of the deceased Syed Abdullah bin Hassan Alattas being entitled to have vested in her Provisional Lot Nos: 108 and 109 in certificate of Title No: 2264 Lot 4271, Jalan Ngee Heng, Johore Bahru in the Township of Johore Bahru by virtue of a Deed of Family Arrangement dated 10 September 1959 and sanctioned by the Honourable Court by an Order made on 17 September 1959.
>
> AND IT IS FURTHER ORDERED that the Respondent, Mahmood bin Maideen as Assignee of the share right title and interest of Provisional Lot Nos: 108 and 109 of Certificate of Title 2264 Lot 4271, Jalan Ngee Heng, Township of Johore Bahru is entitled to have vested in him the said Provisional Lot Nos: 108 and 109, Certificate of Title 2264 Lot 4271 on the sub-division being approved and titles being issued thereon.
>
> AND IT IS FURTHER ORDERED that the said Provisional Lots 108 and 109 Certificate of Title 2264 Lot 4271, Jalan Ngee Heng, Township of Johore Bahru do therefore vest in the said Respondent, Mahmood bin Maideen to the intent that he be the absolute owner thereof on the said titles being issued thereon.
>
> AND IT IS ALSO ORDERED that the Registrar of Titles, Johore Bahru do make all the relevant entries and memorials in the Register of Titles as may be necessary to give effect to this Order to which the said proposed sub-divisional Plan shall be annexed thereto as part of this Order designating Provisional Lot Nos: 108 and 109 Certificate of Title Nos: 2264 Lot 4271.

The Deed of Family Arrangement dated 10 September 1959 as stated in the consent order of 24 April 1978 Land Enactment No: 1 expressly stipulated certain outstanding liabilities which strongly confirmed my finding that the liabilities of the said estate were not yet ascertained nor identified. That being the case Syed Abdullah bin Hassan Alattas as one of the beneficiaries of the late Syed Hassan bin Ahmad Alattas had no interest in any specific property of the said estate and, consequently, he could not pass title to K. Kungi Moidin.

The consent order dated 24 April 1978 was good and enforceable between the parties thereto. It can never be extended beyond that. That consent order did not cite the plaintiff nor Estate and Trust Agencies (1927) Ltd as parties and, consequently, it was not binding upon them. It must be remembered that

had they wanted to, the Originating Summons No: 41 of 1978 could have cited the Estate and Trust Agencies (1927) Ltd as a party as on that date (24 April 1978) the latter was registered as the proprietor of Lot 4271 in trust for the said estate. But this was not to be. That consent order did not consider the following crucial impediments:

(1) the inability or lack of capacity of Syed Abdullah bin Hassan Alattas as one of the beneficiaries of the said estate to enter into a contractual agreement with K. Kungi Moidin for the sale of 5,840 square feet of land out of Lot 4271;

(2) the administration of the said estate was incomplete and its residuary unascertained and, consequently, all the beneficiaries have no interests in any specific property of the said estate,

Put bluntly, the court order dated 24 April 1978 was a mere paper judgment, good between the parties thereto but unenforceable against The Estate and Trust Agencies (1927) Ltd. It was certainly unenforceable against the plaintiff.

In so far as the agreement dated 7 November 1955 was concerned, subject to the question of limitation, the defendant has a contractual right against Syed Abdullah bin Hassan Alattas and not a real right to Lot 4271 (*Haji Abdul Rahman And Another v. Mahomed Hassan* [1917] AC 209 PC; and *Ong Chat Pang & Anor. v. Valliapa Chettiar* [1971] 1 MLJ 224 FC).

Paragraph 5 of encl. 28 alleged that the plaintiff was involved in fraud and collaborated with third parties to become the registered proprietor of Lot 4271. Paragraph 2 of the Statement of Defence too alleged that the title was defeasible as the plaintiff became the registered owner by fraud and via a void instrument. At this juncture, I am reminded of the sage words of the eminent judge Hashim Yeop A. Sani SCJ in *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 2 MLJ 183 at p. 185:

> The underlying philosophy in the Order 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

Then way back in 1961, Thomson CJ in *Syn Lee & Co. Ltd v. Bank of China* [1961] MLJ 87 CA observed in erudite terms:

> With great respect it seems to me there may have been some slight misapprehension on the part of the Assistant Registrar and on the part of the trial judge as to the proper approach. It is not quite the same as the problem with which we are always being faced in the Chancery side of the court of trying issues on affidavit evidence. In a case of this sort it is not a case of trying the issues on affidavit evidence, it is rather a question of deciding on affidavit evidence whether there is a moral improbability of a very high degree that the defendant can possibly succeed.
>
> On the other hand we have to remember that the Order is there as much in the interests of defendants as in the interests of plaintiffs. It is in the interest of plaintiffs that they should be able to get prompt judgment when there is no real defence. But on the other hand it is in the interest of defendants in such cases that plaintiffs should be able to get judgments not only expeditiously but economically."

Now, in deciding the issue of fraud on affidavit evidence the plaintiff in para. 6 of encl. 72 denied it entirely and put the defendant to strict proof thereof . It is the law that the defendant must prove fraud beyond reasonable doubt (*Beh Lee Liang v. Chew Sah Suak @ Chew Sar San & Anor.* [1996] 1 CLJ 173 and the cases cited therein). Fraud was not particularised in the affidavit of the defendant except to say that there was fraud and the plaintiff collaborated with third parties. This court was put on a guessing spree to ascertain what was the fraud perpetrated by the plaintiff. This simply won't do. The statement of defence adverted to fraud via a void instrument – again this court was in a dilemma as to what was the instrument that was said to be void. The sale and purchase agreement dated 9 July 1991 where the plaintiff bought Lot 4271 from the surviving trustees of the said estate was a perfectly legitimate exercise sanctioned, so to speak, by an order of court dated 29 February 1992.

An argument was advanced that the consent Order of the High Court, Seremban dated 24 April 1978 had decided the issue of ownership to 5,840 square feet of land out of Lot 4271 in favour of the defendant. The matter therefore ended there, so it was submitted. The case of *Wong Peng Yan Benjamin v. Genting Bhd. & Anor.* [1993] 3 MLJ 713 was on an entirely different set of facts and what Malek Ahmad J (now JCA) held at p. 714 of the judgment has no parallel with the facts of the present case. There it was held at p. 714 of the headnote:

> For *res judicata* to apply, the parties need not be the same and there had to be privity of interest between the defendants in both actions by the plaintiff. As it was not disputed that the second defendant was the registrar and agent of the first defendant, the liability of the first and second defendants were merged. After making the option to leave the first defendant out of the 1988

> action, the plaintiff was estopped from dragging the first defendant in for relief similar to that which he had obtained in the 1988 action. As a result, having sued the agent, the plaintiff was not in a position to sue the principal for the same transaction.

Here, on 24 April 1978 had Estate and Trust Agencies (1927) Ltd been made a party before the High Court at Seremban then the correct parties would be before the court and once judgment had been pronounced all the parties affected by the judgment would be precluded from disputing those facts in any subsequent litigation between them. But alas, this was not the case. The defendant too failed to register his legal right to 5,840 square feet of land out of Lot 4271 with the Registrar of Titles even though there was provision in the order of the High Court, Seremban to that effect. Thus, in a scramble to get to the register the plaintiff emerged the winner.

The court in *Lee Sem Yoong v. Leong Yoong* [1967] 2 MLJ 86 laid down the principle that for the doctrine of *res judicata* to apply, a defendant has to show that there was a former suit between the same parties for the same matter and upon the same cause of action, and also that the matter directly and substantially in issue has been heard and finally decided by the court which heard it.

I did say in *Chan Yuow Seng v. Ling Ong Hua* [1995] 2 MLJ 580 especially at p. 584 :

> I am fully aware that the doctrine of *res judicata* is grounded on the theory that there must be an end to litigation and that this theory is grounded, firstly, on the general interest of the community in the termination of disputes and in the finality and conclusiveness of judicial decisions and, secondly, the right of the individual to be protected from vexatious multiplication of suits by an opponent whose superior wealth, resources and power may, unless curbed by estoppel, weigh down the judicially declared right of an individual. Put differently, and to borrow the words of *Lord Blackburn in Lockyer v. Ferryman* [1877] 2 App. Cas. 519, HL (at p. 530):
>
> > The object of the rule of *res judicata* is always put upon two grounds - the one public policy, that is the interest of the State that there should be an end of litigation, and the other, the hardship on the individual that be should be vexed twice for the same cause'.

The headnote to the case of *Chan Yuow Seng v. Ling Ong Hua* (*supra*) bears repetition and it is in these words:

> The doctrine of *res judicata* means that a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto, disposes once and for all of the matters decided, so that they cannot afterwards be raised for relitigation between the same parties or their privies.

It is abundantly clear from the consent order of the High Court, Seremban dated 24 April 1978 that all the parties were not before the court and this meant that there was no final judicial decision pronounced on the subject matter. It is my judgment that the doctrine of *res judicata* cannot apply to the present case. Moreover the defendant did not specifically raise the issue of *res judicata* in encl. 68 (*Re Tan Tye, deceased, Yap Liang Neo v. Tan Yew Chee* [1936] MLJ 41 at p. 150; and *Society of Medical Officers of Health v. Hope* [1959] 1 QB 462 at p. 480; [1959] 1 ALL ER 509; [1959] 2 WLR 377 CA). The defendant too failed to adduce any evidence to show that the same issues to be decided by this court had been decided by the High Court, Seremban.

Next, it was argued that the court was *functus officio* once the order of the High Court, Seremban dated 24 April 1978 had been perfected. Reliance was placed on the case of *Plenitude Holdings Sdn. Bhd. v. Tan Sri Khoo Teck Puat & Anor*. [1993] 2 MLJ 469. With respect, the law as enunciated in Plenitude Holdings Sdn. Bhd. (*supra*) has been lucidly laid out in regard to the issue of *functus officio* but the facts are poles apart from the present case. Here, all the relevant parties were not before the High Court, Seremban on 24 April 1978 whereas everyone material was present in Plenitude Holdings Sdn. Bhd. (*supra*).

It was argued that the plaintiff obtained title to Lot 4271 by way of a court order to remove twenty caveats lodged by twenty defendants as seen in the case of *Punca Klasik Sdn. Bhd. v. Abdul Aziz bin Abdul Hamid & Ors.* [1994] 1 MLJ 136 where the court there held the view that since the twenty defendants owned only a portion of the property by law their caveats on the land could not be maintained. This was what James Foong J said in that case at p. 140:

> The plaintiffs' application by way of this motion is to remove these 20 caveats of the defendants. Their argument is mainly based on the proviso to s. 322 (1) of the National Land Code (1965) ('the NLC') which is amended to read as follows:
>
> > Provided that such a caveat shall not be capable of being entered in respect of a part of the land.

> As the defendants are only holding interests in parts of the said property, by this statutory provision they have no legal right to enter caveats on the said property.

At p. 141 of the same case, James Foong J continued:

> The National Land Code (Amendment) Act 1984 which came into effect on 25 March 1985 has altered the law relating to caveats after the case of *N. Vangedaselam v. Mahadevan & Anor.* [1976] 2 MLJ 161. The new proviso to s. 322 (1) of the NLC specifically provides that no caveats shall be capable of being entered in respect of a part of the land. In the Supreme Court decision of *Tan Heng Poh v. Tan Boon Thong & Ors.* [1992] 2 MLJ 1, it is clearly explained that 'a person who is interested only in a specific portion of land cannot enter a caveat against the land'. This is the position of the law as it is today.

The Supreme Court in *Chor Phaik Har v. Farlim Properties Sdn. Bhd.* [1994] 3 MLJ 345 refused to follow the decision of another panel of the Supreme Court in *Tan Heng Poh v. Tan Boon Thong & Ors.* (*supra*). It is interesting to note that the decisions of *Tan Heng Poh (supra)* and *Chor Phaik Har (supra)* were written by eminent judges of the Supreme Court – the former was written by Mohd. Azmi SCJ (now FCJ) while the latter was written by Edgar Joseph Jr. SCJ (now FCJ). In *Chor Phaik Har (supra)*, the Supreme Court held the view that the proviso to s. 322 (1) of the NLC prohibited the entry of a caveat over part of the land but said nothing about the validity of a caveat over the whole land which was limited to protect a registrable interest in a portion thereof. The Supreme Court in *Chor Phaik Har (supra)* further held the view that s. 322 (1) of the NLC was purely declaratory of the principles enunciated in *N. Vangedaselam v. Mahadevan & Anor.* (*supra*) in that a person who claimed a registrable interest in a portion of land may caveat the whole land, provided the caveat was expressly limited to protect only that claim, which must be an interest recognized under the NLC as being either registrable or entitled to protection. This was how Edgar Joseph Jr. SCJ (now FCJ) put it in *Chor Phaik Har (supra)* at p. 356:

> True it is that the proviso to s. 322 (1) prohibits the entry of a caveat over part of the land, yet it says nothing about the validity of a caveat over the whole land but whose effect is limited to protect a claim to a registrable interest in a portion or an undivided share thereof.

At p. 358 of *Chor Phaik Har (supra)*, Edgar Joseph Jr. SCJ (now FCJ) continued:

> In other words, we would answer the question arising upon the preliminary point of law in favour of the appellant caveator; that is to say, that the proviso to s. 322 (1) is purely declaratory of the principles enunciated in Vengedasalam.

It was argued that the law has changed since the arrival of *Chor Phaik Har (supra)* and, consequently, the issue can be relitigated again. With respect, when James Foong J decided *Punca Klasik Sdn. Bhd. v. Abdul Aziz bin Abdul Hamid & Ors. (supra)*, his Lordship was bound by the decision of the Supreme Court in *Tan Heng Poh v. Tan Boon Thong & Ors. (supra)* as that was the law as it stood then. By 21 January 1994 the plaintiff became the registered owner of Lot 4271. How could the plaintiff foresee that the law would change by *Chor Phaik Har (supra)* which was decided on 9 September 1994? Once registered the plaintiff would have an indefeasible title to or an interest in Lot 4271 – a title or an interest that was free of all adverse claims or encumbrances not noted on the register. In short, the effect of registration would be to defeat all prior unregistered claims. As Ali Acting CJ (Malaya) said in *Teh Bee v. K. Maruthamuthu* [1977] 2 MLJ 7 FC: "Under the Torrens System the register is everything."

On the question of relitigation, this court must look at the justice of the case and the exact circumstances of the case before deciding whether the case ought to be relitigated. Towards this end, I am reminded of the decision of the Chancery Division in the case of *Arnold and Others v. National Westminster Bank plc* [1988] 3 All ER 977 where Sir Nicolas Browne Wilkinson VC said at p. 983:

> In my judgment a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. If, as I think, the yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of new facts. In both cases the injustice lies in a successful party to the first action being held to have rights which in fact he does not possess. I can, therefore, see no reason for holding that a subsequent change in the law can never be sufficient to bring the case within the exception. Whether or not such a change does or does not bring the case within the exception must depend on the exact circumstances of each case.
>
> Turning again to the circumstances of the present case, I have no doubt that justice does require the matter to be relitigated. The following factors are in my judgment relevant. (1) There is a continuing contractual relationship of landlord and tenant under which (if there is an issue estoppel) the decision of Walton J will regulate four further rent reviews and thereby affect the rent payable until the end of the term. (2) Because of the peculiarities of the procedure applicable to appeals from arbitrators, unlike the ordinary case of a prior decision by a judge, the decision of Walton J was not subject to appeal. Therefore a matter of very great financial importance involving millions of pounds will, if an issue estoppel applies, be decided on a point of law which the lessees have never had the opportunity to test in the higher Courts. (3) The decision whether or not to permit an appeal was the decision of Walton

J himself and there was no right of appeal against his refusal to certify the matter fit for appeal. The lessees took every possible step to test the decision in the earlier case in the higher courts but without success. (4) Subsequent decisions, in particular that of the Court of Appeal in *Equity and Law Life Assurance Society Ltd v. Bodfield Ltd* [1987] 1 EGLR 124, make it, at the lowest, strongly arguable that the decision of Walton J was wrong. These factors taken together satisfy me that this is a case in which justice requires that issue estoppel should not apply. I therefore hold that the plaintiffs are not estopped from raising the matter of construction pleaded in para. 20 of the statement of claim and accordingly dismiss the application to strike out that paragraph.

Here, there was no continuing contractual relationship between the plaintiff and the defendant. The procedure adopted by the plaintiff in encl. 28 for final judgment under O. 14 of the RHC was not peculiar and my decision would certainly be appealable. The justice of the case favoured the plaintiff who has since had indefeasible title to Lot 4271, This is my judgment and I so hold accordingly.

The possibility of relitigation as envisaged in *Arnold and Others v. National Westminster Bank plc* (*supra*) was tied up to the issue of estoppel and estoppel was never raised by the defendant in encl. 68. Be that as it may, reverting back to the issue of a void instrument, it was submitted that since the plaintiff purchased Lot 4271 from the three surviving trustees on 9 July 1991 instead of and from the four trustees, that sale was said to run counter to s. 340(2)(b) of the NLC and the plaintiff therefore did not have indefeasible title to Lot 4271. Flowing from this, it was argued that this court should give effect to the order of the High Court, Seremban dated 24 April 1978. The defendant heavily relied on the following four cases to drive home the point that the plaintiff should purchase Lot 4271 from four trustees and not from the three surviving trustees. I will now proceed to discuss briefly the following four cases not in their order of merit.

In *Mayo v. Mayo* [1943] 1 Ch. D 302 where the facts were that two of the trustees of a will, who were also trustees for the purposes of the Settled Land Acts, refused to concur with the remaining trustee in exercising the statutory powers of sale on which certain freehold property was held. The remaining trustee took out a summons under s. 30 of the Law of Property Act 1925, for an order directing his co-trustees to concur with him in offering the property for sale in such manner as the court should think fit. It was held that the judicial discretion conferred on the court by s. 30 of the Law of Property Act 1925, on an application of this kind "to make such order as it thinks fit" must be exercised in the same way as the discretion which was exercisable by the court in the case of an instrument containing an express

trust for sale and a power of postponement, and that the two trustees must be directed to concur with the remaining trustee in taking the necessary steps for the sale of the property.

The principle of law laid down in *Astbury v. Astbury* [1898] 2 Ch. D. 111 was that an acknowledgment by one of two executors and devisees in trust of real estate against the wishes of the other that more than six years' interest was due on a mortgage created by their testator cannot be treated as the valid act of the two in their capacity of trustees, and was not a good acknowledgment within s. 42 of the Real Property Limitation Act 1833.

In *re C. Flower, M.P., And Metropolitan Board Of Works* (1884 F. 1048), *In re M. Flower And Same* (1884 F. 1049) [1884] Ch. D. vol. XXVII 592 where the facts were that the trustees of real estate sold parts of it to the Metropolitan Board of Works, and they sent in a requisition that the vendors should attend personally to receive the purchase – moneys, or direct the moneys to be paid to their joint account at a bank. One or more of the trustees resided in the country. On summonses taken out under the Vendor and Purchaser Act, 1874, by the board it was held that the requisition must be complied with by the trustees, and that they must pay the costs of the application.

The court *In re Whiteley, Bishop of London v. Whiteley* [1910] 1 Ch. D. 600 had to construe a Will and in so doing the court held that the rule stated in *Wilkinson v. Malin* [1832] 2 Tyrw 544, 571, that in the administration of a trust of a "public"' nature the act of the majority was to be treated as the act of the whole body, applied equally to a trust of a "charitable" nature; and therefore, in selecting a site and in founding the homes, the decision of the majority of the W.H. trustees was binding upon the minority.

Relying on these four English authorities, it was submitted that the present case involved private trusts and the trustees – all four of them must act together as a group. All these are well and good. But the affidavit in reply of Wong Chan Thong in encl. 72 particularly in paras. 5 and 6 which showed that the three surviving trustees had applied to the High Court on 29 February 1992 for an order to sell Lot 4271 by public auction at RM24 million with an option to the plaintiff to purchase upon additional payment of RM250,000 and that the plaintiff had exercised that option and purchased Lot 4271 from the surviving three trustees were not disputed at all by the defendant as there were no replies to these paragraphs. A common thread that runs through these four English authorities is this. It was in relation to living trustees and the question that arose for decision was whether the majority can bind the minority. Whereas in the present case we have a unique situation where the three surviving trustees agreed in unison to sell Lot 4271. For the reasons adumbrated above, I allowed encl. 28.